

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B5

DATE:

OCT 25 2012

OFFICE: TEXAS SERVICE CENTER FILE:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Texas Service Center (Director). The approval was subsequently revoked by the Director. The Director's decision is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner recruits teachers and places them in school systems around the country. It seeks to permanently employ the beneficiary in the United States as a science teacher pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on January 3, 2007. The petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed with the Department of Labor (DOL) on June 16, 2003, and certified by the DOL on December 15, 2006.

Following a Request for Evidence, to which the petitioner responded with additional documentation, the Director approved the petition on April 18, 2007.

On May 28, 2010, however, the Director issued a Notice of Intent to Revoke (NOIR) the approval of the petition. The Director reviewed the evidence of record and questioned whether the petitioner would actually be the beneficiary's employer. The record indicated that the beneficiary began working as a math and physics teacher in the [REDACTED] School System in September 2001, but by 2004 was employed by the City of New York and continued to be so employed up to the present. According to the Director, it appeared that the petitioner is a staffing agency for U.S. school systems, but the teaching positions are offered by the school districts. In the Director's view, therefore, the employer in this case would be the school system, not the petitioner. The Director also noted that the petitioner must establish its ability to pay the proffered wage from the priority date (June 16, 2003 – the date the labor certification underlying the instant petition was received for processing by the DOL) up to the present, citing *Matter of Katigbak*, 14 I&N Dec. 45 (Comm. 1971) and *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Reviewing the evidence of record, the Director indicated that copies of the petitioner's federal income tax returns for the years 2003-2005 had been submitted, but not for any years thereafter. For the years 2006 onward, therefore, there was no way to determine whether the petitioner had the ability to pay the proffered wage based on its net income or net current assets year by year. Furthermore, the Director noted that the petitioner had filed a total of 197 petitions since 2003 for immigrant (Form I-140) and nonimmigrant (Form I-129) workers, and that the petitioner must establish its ability to pay the

proffered wages of all the other beneficiaries of these additional petitions. No such evidence was in the record.

The petitioner responded to the NOIR with a brief from counsel and additional documentation addressing the issues discussed by the Director.

On August 31, 2010, the Director issued a decision revoking the approved petition, citing his authority under section 205 of the Act.¹ In reviewing the evidence of record the Director noted, among other things, the lack of any contract between the petitioner and the [REDACTED] System outlining the terms of their relationship and the fact that the beneficiary had been employed by the [REDACTED] since 2004. The Director determined that the petitioner still had not established that it truly intended to employ the beneficiary when it filed the Form I-140 petition in 2006, and during the time since then. The Director also discussed the additional documentation submitted by the petitioner in response to the NOID, which included the petitioner's federal income tax returns for the years 2006-2008 as well as labor certifications and Forms W-2 (Wage and Tax Statements) of many of the beneficiaries of other Form I-140 petitions filed since 2003. With respect to the federal tax returns, the Director noted that the 2006 and 2008 forms (unlike the earlier submitted forms for 2003-2005) were not signed or dated. Thus, there was no declaration from the petitioner or the preparer that the information in the tax returns was true and correct. Nor was there any independent evidence that the returns were actually filed with the Internal Revenue Service (IRS). Accordingly, the financial information in the returns could not be used to determine the petitioner's ability to pay the proffered wage in the years 2006-2008. As for the other Form I-140 and Form I-129 petitions, the Director stated that 244 had been filed since 2003, of which 106 were Form I-140 petitions. According to the records of U.S. Citizenship and Immigration Services (USCIS), 102 Form I-140 petitions had been filed as of May 28, 2010 – the date the NOIR was issued. However, the petitioner had submitted copies of only 78 labor certifications (and W-2 forms for the associated beneficiaries). The Director concluded that the petitioner's ability to pay the multiple beneficiaries of its Form I-140 petitions "cannot be determined based on partial evidence." Accordingly, the approval of the petition was revoked.

The petitioner filed an appeal, Form I-290B, on September 16, 2010, followed by a brief from counsel and additional documentation, including (1) an affidavit by the beneficiary of a telephone conversation he had with an "immigration officer" in April 2010 about his employment in the [REDACTED]

[REDACTED]; (2) a copy of the [REDACTED] between the petitioner and the [REDACTED] for the 2005-2006 school year; (3) copies of the petitioner's federal tax returns for the years 2006, 2008, and 2009; and (4) the first page of seven monthly bank statements of the petitioner (January 2010 to July 2010) with [REDACTED]

¹ Section 205 of the Act, 8 U.S.C. § 1155, states that:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Based on the entire record – including the "Employment Agreement" between the petitioner and the beneficiary, dated April 7, 2003, the "Teaching Services Agreement" between the petitioner and the [REDACTED] dated August 10, 2005, and a letter (undated) from the Director of [REDACTED] of [REDACTED] verifying its teaching services agreement with the petitioner – the AAO concludes that the petitioner has established that it was the beneficiary's employer at the time he worked in the [REDACTED], that it intended to employ the beneficiary at the time the instant Form I-140 petition was filed in 2006, and that its intention to employ the beneficiary has continued up to the present. Accordingly, the petitioner has overcome this ground for revocation, and the Director's finding on the "intent to employ" issue will be withdrawn.

However, the petitioner has not overcome the second ground for revocation in the Director's decision because it still has not established its continuing ability to pay the proffered wage from the priority date (June 16, 2003) up to the present.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Furthermore, the petitioner must produce evidence that its job offers to each and every beneficiary, are realistic – *i.e.*, that it has the ability to pay the proffered wage to the instant beneficiary and to every other beneficiary of pending Form I-140 petitions as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

The new copies of the petitioner's federal income tax returns submitted on appeal – for 2006, 2008, and 2009 – do not cure the defects of the previous returns. While the three returns include the signature of the petitioner's president, they were not dated by the president. Nor are they signed and dated by the preparer of the forms. For the same reasons discussed by the Director in his revocation decision, therefore, the financial information in the returns cannot be used to determine the

petitioner's ability to pay the proffered wage in the years 2006, 2008, and 2009. As for the other Form I-140 petitions filed by the petitioner since 2003, no new evidence has been submitted on appeal. Thus, the petitioner has still accounted for only 78 of the 102 Form I-140 petitions. The petitioner has submitted no evidence of its ability to pay the beneficiaries of the remaining 24 petitions.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

As for the bank statements submitted on appeal, the petitioner's reliance upon them is misplaced. Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) – annual reports, federal tax returns, or audited financial statements – required to demonstrate a petitioner's ability to pay a proffered wage. While the regulation allows for additional materials "in appropriate cases," the limited number of bank statements submitted by the petitioner in this proceeding show the account balance on a few dates, but do not show the sustainable ability of the petitioner to pay the proffered wage. No evidence has been submitted to demonstrate that the funds reported in the monthly bank statements of January 2010 through July 2010 reflect additional funds that would not have been accounted for in the petitioner's federal income tax return for 2010 (which is not in the record). Moreover, the bank account statements cover only a seven-month period in 2010, a small portion of the time frame (from the priority date up to the present) in which the petitioner must establish its continuing ability to pay the proffered wage to the instant beneficiary and the beneficiaries in all other Form I-140 petitions pending since 2003.

Thus, the petitioner has not established its continuing ability to pay the proffered wage of the instant beneficiary from the priority date (June 16, 2003) up to the present, as well as the proffered wages of all other beneficiaries of Form I-140 petitions that were pending during that time period. On that ground, therefore, the AAO concludes that the revocation of the approved petition was proper. The Director's decision will be affirmed, and the appeal dismissed.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

As always in visa petition proceedings, the burden of proof rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.